M E M O R A N D U M

July 6, 1993

TO: PRT and NHW

FROM: DLS

RE: Philip Morris/IAQ--Meeting with Florida DOL's Safety Division

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On June 25, 1993, I met with officials of the Florida Department of Labor's (DOL) Division of Safety regarding their plans to regulate IAQ and ETS. I first met with Linda Knowles, the person primarily responsible for drafting the planned regulation, and discussed the documents that I brought her.

I provided Linda with two notebooks, one containing selected documents from the OSHA docket on IAQ (H-122) and one containing the summary volume from Philip Morris' comment to the OSHA docket. Specifically, the notebook of documents from the OSHA IAQ docket included the following:

1. Summary of OSHA's Request for Information on Occupational Exposure to Indoor Air Pollutants;

2. OSHA's Request for Information on Occupational Exposure to Indoor Air Pollutants;

3. ASHRAE Standard 62-1989: Ventilation for Acceptable Indoor Air Quality;

4. ASHRAE Standard 55-1981: Thermal Environmental Conditions for Human Occupancy;

5. Written Statement of ASHRAE to the Science, Space and Technology Subcommittee on Natural Resources, Agriculture Research and Environment;

6. California Indoor Air Quality Program's Comment to OSHA regarding CAL/OSHA Minimum Ventilation Standard;

7. Healthy Buildings International's Comment to OSHA;

8. Total Indoor Environmental Quality Coalition's Comment to OSHA;

9. Dr. Alan Hedge's (of Cornell University) Comment to OSHA; and

10. Business Council on Indoor Air's Comment to OSHA.

The notebook from Philip Morris' comment was comprised of sections entitled Executive Summary, Background Statement, Response to Risk Assessments, and Glossary.

I briefly described each document to Linda. She appeared quite interested and stated that the documents would be helpful. I particularly emphasized the ASHRAE documents and the comment on CAL/OSHA's minimum ventilation standard. I stressed that the CAL/OSHA standard was designed to maintain adequate indoor air quality. Linda pointed out that the 1981 ASHRAE standard on thermal conditions has been updated in a 1992 version. She showed me her copy of the updated version. Linda also stated that she had a copy of the ASHRAE ventilation standard, which she recently misplaced.

During our review of the documents, most of which emphasized ventilation, Linda acknowledged the importance of adequate ventilation to good IAQ. She mentioned that levels of ETS are often different at different workplaces because of differences in ventilation systems. I stressed that ETS levels in the home also vary for the same reason, and that home levels are quite different from workplace levels. I pointed out that EPA's risk assessment on ETS is based on studies of non-smoking spouses of smokers who are exposed to ETS at home, and not on workplace ETS exposures that would undoubtedly be very different.

Linda expressed her concern for asthmatic and sensitive employees, emphasizing that smokers and non-smokers must often work closely together. She told of the time that she moved into an office formerly occupied by a smoker and how the smell annoyed her. She described how the office walls were yellow from the smoke and how she had to have the entire office cleaned before she could occupy it.

Finally, Linda and I discussed the costs of smoking policies. I pointed out that where smoking is restricted to break time and certain areas, some smokers may take unauthorized smoking breaks or extend authorized breaks. I stated that this problem can cost employers large sums in lost productivity. Linda responded that the smokers in her office, where smoking is restricted to outside, do not take unauthorized or "extra-long" breaks. She emphasized that many of them now smoke fewer cigarettes and are thus much healthier. This last comment illustrates how Linda appears somewhat preoccupied with the health effects of active smoking.

After talking with Linda for approximately 20 minutes, she introduced me to Bert Garrido, Director of the Safety Division, and Gary Strobel, the Division's Program Manager of Occupational Safety and Health. Gary commented that he knows Pat well, having been his deputy for regulatory affairs at OSHA. Gary stated that he is also well acquainted with Ed McGowen. Bert invited me to discuss the IAQ issue with him, Gary, and Linda, and I accepted. We met at a conference table in Bert's office.

Bert began the discussion by asking what Philip Morris would like to see done about IAQ and ETS. I responded that since there are a host of indoor air constituents and no one constituent can be isolated as the cause of sick building syndrome, Philip Morris correctly believes that a general ventilation standard is the only way to solve the whole problem and provide employees with complete protection. Such a standard might require a certain rate of outside air, as well as specific provisions for maintenance and cleaning of ventilation systems. I informed Bert that this is the approach taken in the ASHRAE ventilation standard, which recommends an outside air intake of 20cfm/person. I pointed out that improperly designed and/or maintained ventilation systems are responsible for the overwhelming majority of sick building syndrome cases.

Bert then asked, "wouldn't [a ventilation standard] be too costly?" I responded that according to ASHRAE studies, the cost of implementing its suggested 20cfm/person ventilation rate would not be excessive since in most cases the recommended rate could be achieved without upgrading or retrofitting ventilation equipment. According to ASHRAE, most buildings do not utilize the full capacity for which their ventilation equipment was designed, instead reducing ventilation rates to save relatively small sums on energy cost. I pointed out that this fact was recognized by the advisory committee charged with developing California's minimum ventilation standard. According to the California Indoor Air Program's comment to OSHA, the advisory committee noted that otherwise adequate ventilation systems were often operated at a rate below that for which the system was designed.

Bert stated that the Safety Division planned to act "very quickly" to promulgate a standard on IAQ. He pointed out that their standard will specifically regulate ETS to some extent. According to Bert, smoking is currently banned in state buildings, and the Division is likewise considering banning ETS from the private-sector workplace.

Bert realizes that they need to act fast because of the threat of federal preemption. He mentioned the Gade case and

referred me to §18(a) of the OSH Act, which he interprets as permitting them to promulgate and enforce a state IAQ rule until OSHA finalizes its planned IAQ standard. He emphasized that he expects OSHA to take many years to complete its IAQ rulemaking, referring to the more than a decade required by OSHA to promulgate a confined spaces standard. He stated that the Division can promulgate a standard much quicker than federal OSHA.

According to Bert, Florida plans to be the first state to have an IAQ rule. He seems committed to this goal, for what reason I could not discern. Bert expects other states to look to Florida's rule as a model. I gently reminded him that California already has an IAQ rule in its minimum ventilation standard.

Bert asked what ground the tobacco industry might be willing to give on the ETS issue. I responded that I really was not in a position to negotiate for the industry or for Philip Morris, but that negotiation is a good idea. Bert stated at least three times that he would like to avoid litigation with the tobacco industry, but that he realizes that litigation is "just a fact of life" for a regulatory agency. He suggested a meeting with tobacco industry representatives as soon as possible to negotiate over the content of the Florida rule. He stated that he is hopeful that there is some middle ground that both sides could agree upon.

Bert cautioned, however, that he would only negotiate an agreement with the tobacco industry as a whole and not with Philip Morris alone. He stated that it would not benefit him to reach an agreement with Philip Morris only to be sued by RJR or some other company. I agreed that meeting is a good idea. Bert then stated that he would like to have some of his science experts at the meeting, and I responded that I did not see a problem with having scientists present. I told Bert that I would discuss with Pat and Philip Morris the prospect of a negotiation meeting and that I would get back with him.

Our discussion then turned to the scientific evidence on ETS. Bert commented that there is science on both sides of the ETS issue, "depending on which expert you are asking." I referred Bert to the section of Philip Morris' OSHA comment that criticizes the EPA risk assessment on ETS. I emphasized that the EPA risk assessment was based upon ETS exposure in the home and not at work. I told Bert and the others that EPA developed its risk assessment from consideration of 30 studies, all of which focused on spousal exposure to ETS in the home. I pointed out that although 11 of those 30 studies included estimates of workplace exposures, 10 of the 11 reported no statistically significant increased risk. I stressed that, although I am not a scientist, it seems to me that

examination of the ETS levels to which non-smoking spouses of smokers are exposed in the home is not an acceptable substitute for examining workplace exposures.

Also, I informed Bert and the others that although a large body of literature exists on actual measurements of ETS exposure, not one of the 30 spousal smoking studies considered by EPA included actual measurements of ETS exposure. Exposure in those studies was only estimated from responses to questionnaires.

Next, we compared the "legal hurdles" that federal OSHA will have to cross to regulate ETS with Florida's legal requirements. I explained that OSHA would have to show the following: that ETS poses a significant risk of material health impairment at levels regulated; that the ETS dose-response relationship is such that the regulation will prevent material health impairment; and that implementation of the regulation is feasible. Citing the Benzene and Cotton Dust cases, Gary stated his belief that OSHA is given deference to choose from a range of ETS levels in deciding what level to regulate. I told him that I believe OSHA must justify its choice of the specific ETS level to regulate, but courts will show the agency some deference in choosing scientific evidence to support the chosen level.

In comparison, Bert informed me that the legal test in Florida requires only that the Safety Division show that its regulation is "reasonable." He described the Florida test, contained in section 120 of the Florida Administrative Procedure Act, as "open-ended," and he stated that it is not difficult for the Division to satisfy.

During our discussion of the legal requirements, Bert asked if OSHA has used the "general duty clause" to indirectly regulate IAQ and/or ETS. I responded that I do not know of OSHA having ever cited an employer under the general duty clause for exposing employees to alleged IAQ or ETS hazards. I explained that this is probably because a hazard must be recognized by the employer in order for there to be a general duty clause violation, and that the existence of a "recognized hazard" would be very difficult for OSHA to prove in an IAQ/ETS context. I stressed that whether OSHA was attempting to prove the "recognized hazard" element of the general duty clause or attempting to demonstrate significant risk in a rulemaking proceeding, the agency would have to clear the same "science hurdle" of showing that workplace levels of ETS cause serious health effects. This, I stated, has not been shown.

Bert then asked how I located Linda. I responded that during my survey of state agency rulemaking activity, I simply called the Safety Division and asked if they were doing anything on IAQ. I was then referred to Linda. Bert commented that I "struck gold," because they are just beginning to consider promulgating an IAQ rule. He explained how it is good that I caught them early in the process, before they become publicly committed to a course of action. According to Bert, at this early point in the process, they are more willing to listen to and negotiate with us. Despite these words, Bert seemed disappointed that we discovered their plans so early.

Finally, I asked Bert about their rulemaking process. He told me that they publish notices, containing proposed rules and comment requests, in Florida Administrative Weekly. If within 14 days of publication someone requests a hearing, or upon the Division's own initiative, they hold public hearings. At the hearings, the Division representatives listen to public comments but do not participate in discussions with the public. According to Bert, such hearings are just a formality because the Division will not likely change a proposed rule because of testimony at a hearing. After reviewing the comments and possibly holding a hearing, the Division publishes the final rule. Then, the Division might have to defend its final rule in court. Bert stated that they have been through the entire process, including litigation, just recently regarding their regulation on some other issue. According to Bert, that was the first time he had experienced such litigation.

After nearly two hours of discussion, we concluded the meeting. The atmosphere had remained quite cordial. Before I left, Bert handed me an article on the recent rash of sick buildings in Florida. He stated that the article is somewhat general, but it might be of interest to me. The article, attached to this memorandum, was from the May/June 1993 issue of Safety Resources magazine.